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No. 97-1890

In the Supreme Court of the United States

OCTOBER TERM, 1997

SANDRA K. KERBY, PETITIONER

v.

SOUTHEASTERN PUBLIC SERVICE AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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10 pp

QUESTION PRESENTED

The Longshore and Harbor Workers' Compensation Act (LHWCA) provides compensation and benefits to employees engaged in maritime employment who suffer injuries "upon the navigable waters of the United States * * * including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used" by an employer in specified longshoring and shipyard activities. 33 U.S.C. 903(a). The question presented is:

Whether a power plant that supplies steam and electricity exclusively to a shipyard is located in an "adjoining area" within the meaning of 33 U.S.C. 903(a), where the shipyard is separated from the plant by fences and a railroad spur, and employees of the plant are not routinely given access to the shipyard.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. I-V) is unpublished, but the decision is noted at 135 F.3d 770 (Table). The decision of the Benefits Review Board (Pet. App. VI-XXVI) is reported at 31 Ben. Rev. Bd. Serv. (MB) 6. The decision of the administrative law judge (ALJ) (Pet. App. XXVII-XLIX) is unreported, although the determinative coverage issue, decided in *Rodriquez* v. *Southeastern Public Service Authority* (Pet. App. L-LXX), is reported at 30 Ben. Rev. Bd. Serv. (MB) 226 (ALJ).

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1998. The petition for a writ of certiorari was filed on May 22, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA) provides compensation to covered employees for work-related injuries that result in disability, and to survivors if the injury causes death. 33 U.S.C. 908, 909. A covered employee must meet a "status" requirement—*i.e.*, satisfy the Act's definition of "employee," see 33 U.S.C. 902(3)[1]—and have been injured at a maritime "situs." See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 264-265 (1977). The instant case concerns the "situs" requirement, which appears in Section 3(a) of the Act and which specifies that a disability or death is compensable only if it

> results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. 903(a).

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[1] Section 2(3) of the Act defines "employee," with certain exceptions not relevant here, as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. 902(3).

2. In the 1980s, the United States Navy built a power plant to provide steam and electricity to the Norfolk Naval Shipyard (NNS). Pet. App. LIV. The shipyard is located on land owned by the Navy that is contiguous with a navigable river. *Id.* at IX. The power plant is located on land, owned by the Navy, that is immediately adjacent to a landward side of the shipyard. *Id.* at IX, LV. A privately owned railroad spur separates the power plant from the shipyard, and chain link fences on either side of the spur separate the railroad spur from the Navy's two properties. *Id.* at LV.

In 1989, the Navy contracted with respondent Southeastern Public Service Authority to maintain and operate the power plant. Pet. App. III-IV, IX, LV-LVI. Respondent generates steam and electricity exclusively for the shipyard, which uses all of the steam and controls a "switch yard" on the power plant site that determines how much electricity the shipyard will use. *Id.* at X & n.2, LXIII. Respondent's employees need a badge or special permission to enter the shipyard, however, and therefore do not have immediate access to the shipyard by virtue of their employment with respondent. *Id.* at IV, XXIV, LV.

In *Rodriquez* v. *Southeastern Public Service Authority*, 30 Ben. Rev. Bd. Serv. (MB) 226 (ALJ) (1996), an administrative law judge (ALJ) determined that the power plant operated by respondent is a covered situs for purposes of the LHWCA. Pet. App. L-LXX. The ALJ concluded that the power plant is located on an "adjoining area customarily used by an employer * * * in repairing or building vessels" because the plant was built and is owned by the Navy, is located on land owned by the Navy, and is immediately adjacent

to the shipyard. *Id.* at LXII-LXIII (quoting 33 U.S.C. 903(a)). The ALJ stated that "[t]he fact that the [plant and shipyard] properties are separately fenced off is incidental." *Id.* at LXIII. The ALJ also observed that "the very purpose of the plant is to generate steam and electricity exclusively for" the shipyard, and that the Navy rather than respondent controls the flow of steam and electricity to the shipyard. *Ibid.* The ALJ concluded that NNS had "extended situs to the power plant," which was "strategically located in an adjoining area so as to provide vital steam and electricity to NNS." *Id.* at LXIV.

3. Petitioner was employed by respondent as a heavy equipment and crane operator at the power plant. Pet. App. XXXIII. In August 1994, she sustained a work-related injury. *Id.* at XI, XXXIII. She applied for disability benefits under the LHWCA, asserting that she met the status and situs requirements for coverage. *Id.* at IV. Relying on the decision in *Rodriquez*, the ALJ held that petitioner satisfied the Act's situs requirement. *Id.* at XXX-XXXI n.2. The ALJ also concluded that petitioner satisfied the LHWCA's status requirement and was otherwise eligible for benefits. See *id.* at XXXIX-XLIX; see also *id.* at LXIV-LXV (*Rodriquez* decision on status).

4. The Benefits Review Board reversed. Pet. App. XXI-XXVI. Although the Board affirmed the ALJ's determination that petitioner satisfied the LHWCA's status requirement, *id.* at XVI-XXI, it held that the injury for which compensation was sought had not occurred at a situs covered by the Act. Based on the Fourth Circuit's decision in *Sidwell* v. *Express Container Services, Inc.*, 71 F.3d 1134 (1995), cert. denied, 518 U.S. 1028 (1996), the Board held "that an

area is 'adjoining' navigable waters only if it is contiguous with or otherwise touches navigable waters." Pet. App. XXII. The Board stated that "the location of [a] railroad spur and the presence of two mutually exclusive fenced areas indicates that the two properties [*i.e.*, the shipyard and the power plant] are separate and distinct from one another." *Id.* at XXIV. The Board also noted that respondent's employees do not have immediate access to the shipyard but instead need a special pass or an escort. *Ibid.* Because the plant, as a separate and distinct piece of property, did not adjoin navigable waters, the Board held that petitioner's injury at the plant did not occur on a covered situs under the LHWCA. *Id.* at XXV.

5. The court of appeals affirmed. Pet. App. I-V. The court explained:

> While the parcel of property on which the power plant is located lies adjacent to NNS, and while NNS is located on land contiguous with the Southern Branch of the Elizabeth River, the parcel of land on which the power plant is located is not independently contiguous with that river or any other navigable waters. Moreover, the property on which the power plant is located is separated from NNS by a privately owned railroad spur, and by two chain-link fences, which surround the power plant and NNS respectively, and which separate the properties from the railroad spur, and from each other. [Respondent's] employees do not have access to NNS by virtue of their employment at the power plant.

Id. at IV. The court concluded that "this case is controlled by *Sidwell*," and that the Board had "correctly applied that precedent." *Id.* at V.[2]

ARGUMENT

The instant case presents essentially the same question as did the petitions for a writ of certiorari in *Sidwell* v. *Express Container Services, Inc.*, 71 F.3d 1134 (4th Cir. 1995), cert. denied, 518 U.S. 1028 (1996), and *Parker* v. *Director, OWCP*, 75 F.3d 929 (4th Cir.), cert. denied, 117 S. Ct. 58 (1996). The petitioners in both of those cases sought review of Fourth Circuit decisions holding that they had failed to satisfy the situs requirement for coverage under the LHWCA. In our briefs in opposition filed in those cases, we stated that if the Fourth Circuit's decisions were read to require strict contiguity between a particular place of business and navigable waters, they would create a conflict among the circuits and subvert the effective implementation of the LHWCA.[3] The government opposed the petitions, however, because we did not read the pertinent Fourth Circuit decisions to establish such a rigid rule, and because it was unclear whether other courts of appeals would have reached a different outcome based on the facts presented in those cases. For basically the same rea-

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[2] Because the court of appeals held that petitioner had failed to establish that her injury occurred at a situs covered by the LHWCA, it declined to determine whether (as the ALJ and Board had held) petitioner satisfied the Act's status requirement. Pet. App. V n.*.

[3] We have furnished counsel for the other parties in this case with copies of our briefs in opposition in *Sidwell* and *Parker*.

sons, the petition for a writ of certiorari in the instant case should also be denied.

1. The LHWCA provides for compensation only where the claimant can establish, *inter alia*, that a disability or death "results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or *other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).*" 33 U.S.C. 903(a) (emphasis added). Consistent with the views of the Director, Office of Workers' Compensation Programs (OWCP), the courts of appeals have generally held that a maritime facility may be covered by the underscored language in Section 903(a) even if it is not directly contiguous to navigable waters. See, *e.g.*, *Texports Stevedore Co.* v. *Winchester*, 632 F.2d 504, 513-515 (5th Cir. 1980) (en banc), cert. denied, 452 U.S. 905 (1981); *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137, 141 (9th Cir. 1978) (Kennedy, J.); *Triguero* v. *Consolidated Rail Corp.*, 932 F.2d 95, 100-101 (2d Cir. 1991); see generally Gov't Br. in Opp. at 8-10 & n.5, *Sidwell* v. *Express Container Services*, No. 95-1569.

Construing the phrase "other adjoining area" in Section 903(a) to include a parcel of land that does not itself touch navigable waters is consistent with the statutory language. The term "area," which is not defined in the Act, is not limited to enumerated buildings or structures. See *Black's Law Dictionary* 106 (6th ed. 1990) ("[a]rea" means "[a] surface, a territory, a region * * * [a] particular extent of space or surface or one serving a special purpose"); *Nelson* v. *American Dredging Co.*, No. 96-3724, 1998 WL 231063, at *8-*9 (3d Cir. May 11, 1998). Thus, even if a

particular parcel of property does not itself touch navigable waters, it may properly be regarded as a situs covered by the Act if it is part of a larger "area" that does. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 281 (1977) (pier that is part of a terminal complex); *Sidwell* Gov't Br. in Opp. at 13 n.7 (quoting LHWCA Program Memorandum No. 58, at 10-11 (Aug. 10, 1977)); *Texports*, 632 F.2d at 515.[4]

Construing Section 903(a) in this manner is consistent with that Section's history and purposes, which indicate that the LHWCA's coverage may extend to a maritime facility that is not itself contiguous to navigable waters. See *Sidwell* Gov't Br. in Opp. at 13-15. That view is also consistent with the longstanding position of the Department of Labor's OWCP, as articulated most formally in LHWCA Program Memorandum No. 58, *supra*, at 10-11. By contrast, a rigid requirement that particular places of business be directly contiguous to navigable waters would "reenact the hard lines that caused longshoremen to move continually in and out of coverage * * * [and] frustrate the congressional objectives of providing uniform benefits and covering

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[4] Courts of appeals have also held that the term "adjoining" may be construed to mean "neighboring," so that even if a piece of property is viewed as a distinct "area," it need not directly touch navigable waters to be "adjoining." See *Texports*, 632 F.2d at 514; *Brady-Hamilton*, 568 F.2d at 141. Cf. *Empire Co.* v. *Occupational Safety and Health Review Comm'n*, 136 F.3d 873, 876, 878-879 & n.2 (1st Cir. 1998) (in applying safety regulation governing "wharves, bulkheads, quays, piers, docks and other berthing locations and adjacent storage or contiguous areas and structures," word "contiguous" could permissibly be construed to mean "nearby" as well as "touching") (citing *Texports*).

land-based maritime activity." *Texports*, 632 F.2d at 514-515.

2. As we explained in our brief in opposition in *Sidwell* (at 15-16), we do not believe that the Fourth Circuit has unambiguously articulated such a rigid rule. Although the court has unequivocally held that "an area is 'adjoining' navigable waters only if * * * it is 'contiguous with' or otherwise 'touches' such waters," *Sidwell*, 71 F.3d at 1138-1139, it has not adopted a precise definition of the term "area." The court has stated that "some notion of property lines will be at least relevant" in determining the scope of a covered "area," *id.* at 1140, but it has not held that a business's placement beyond the fence line of a maritime terminal would invariably exclude it from the coverage of Section 903(a). To the contrary, the court stated in *Sidwell* that it was "not certain * * * that the 1977 [OWCP] Memorandum contradicts our interpretation of the statute." *Id.* at 1141-1142; see also *id.* at 1140 n.11 (quoting LHWCA Program Memorandum No. 58, *supra*, at 10-11).[5]

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[5] As petitioner notes (Pet. 15-16), *Sidwell* stated that, to be an "other adjoining area" under Section 3(a) of the LHWCA, 33 U.S.C. 903(a), an area "must be a discrete shoreside structure or facility." 71 F.3d at 1139. The Third Circuit has correctly rejected that interpretation of "area" in holding that an undeveloped beach is an "other area" under Section 3(a). See *Nelson* v. *American Dredging Co.*, 1998 WL 231063, at *8-*9. The decision below does not depend upon application of that aspect of *Sidwell*, however, and it is not clear that that aspect of *Sidwell* was a holding. Review is also not warranted to correct possible inconsistencies among decisions within the Fourth Circuit. See Pet. 18-24. "It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

Petitioner contends, based on the unpublished decision in the instant case, that "it is now clear that the Fourth Circuit's test is based solely on property boundaries, and places no relevance upon any functional relationship between the properties in question." Pet. 15. We agree that the "functional relationship" between two facilities is significant in determining whether they are properly regarded as parts of a single "area" that adjoins the water.[6] We do not believe, however, that the court of appeals in this case has treated functional considerations as irrelevant. The court did not base its decision solely on the fact that "the parcel of land on which the power plant is located is not independently contiguous with [the Elizabeth River] or any other navigable waters." Pet. App. IV. Rather, it also relied on the facts that "the property on which the power plant is located is separated from NNS by a privately owned railroad spur, and by two chain-link fences," and that "[respondent's] employees do not have access to NNS by virtue of their employment at the power plant." *Ibid.* Thus, to the extent that its holding depended on the lack of access of respondent's employees to

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[6] LHWCA Program Memorandum No. 58 explains that

> such facilities as "gear lockers"—buildings in which stevedoring equipment is maintained and stored (and sometimes fabricated)—may be located outside the fenced boundaries of a terminal. Such facilities are in practical fact integral parts of the maritime terminal, existing and being used solely for the loading and discharge of ships; they should be regarded as extensions of the terminals to which they relate. Hence, although they do not themselves adjoin the water, they are parts of terminal complexes which do, and are within the Act.

Id. at 11 (quoted in *Sidwell* Gov't Br. in Opp. at 11-12.)

NNS, the court of appeals in this case treated the "functional relationship" (Pet. 15) between the power plant and the shipyard as directly relevant to the question whether the power plant is a site covered by the LHWCA.

3. The disagreement between petitioner and the court of appeals centers not on *whether* the functional relationship between a particular workplace and shoreside facilities is relevant to the "situs" inquiry, but on what *type* of functional relationship is required. As we read the court of appeals' opinion in the instant case, its analysis turned on the fact that both NNS's personnel policies and the physical layout of the relevant properties minimized the extent to which workers would move about between the shipyard and power plant. Petitioner contends, by contrast, that the requisite functional relationship exists because the power plant is owned by the Navy and "provides steam and electricity for exclusive use by NNS at the terminal and on board ships." Pet. 17; see also Pet. App. LXIII (ALJ in *Rodriquez* concludes that the power plant is a covered situs because "the very purpose of the plant is to generate steam and electricity exclusively for NNS").

Although petitioner asserts (Pet. 17) that she "would have been covered under the Act upon application of the functional tests delineated by the other circuits," the decisions on which she relies did not involve factual settings comparable to that in the instant case. In each of those cases, the claimant himself moved regularly between a ship or shoreside facility and the workplace that was ultimately determined to be a covered situs under the LHWCA. See *Brady-Hamilton*, 568 F.2d at 139; *Texports*, 632 F.2d at 507; *Triguero*, 932 F.2d at 97, 101. Those factual

settings directly implicated the congressional concern that the LHWCA should not be implemented in such a manner as to cause longshore workers "to move continually in and out of coverage." *Texports*, 632 F.2d at 514. None of those decisions addresses the question whether the sort of functional relationship involved in this case—*i.e.*, the fact that the power plant is devoted exclusively to the production of steam and electricity for the shipyard—provides a sufficient basis for holding the plant to be a covered situs. Absent a clear conflict among the circuits, we continue to believe that the Fourth Circuit's analysis of the coverage question does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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